Brief of Buck & Stanton for P.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Mar. 12, 1898.

S. H. WILLIAMS,
Treasurer of the Town of Glastonbury, Hartford County, and State of Connecticut,
PLAINTIFF IN ERROR

vs.

ARTHUR F. EGGLESTON,
Attorney for the State of Connecticut,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

JOHN R. BUCK,
LEWIS E. STANTON,
OLIN R. WOOD,
Counsel for Plaintiff in Error.

HARTFORD, CONN.:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Term, No. 570 Case, No. 16,349

S. H. WILLIAMS,
TREASURER OF THE TOWN OF GLASTONBURY,
PLAINTIFF IN ERROR,

vs.

ARTHUR F. EGGLESTON,
ATTORNEY FOR THE STATE OF CONNECTICUT,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR,

WITH SOME NEW CITATIONS IN SUPPORT OF THE CLAIMS MADE IN THE ORIGINAL BRIEF ON THE MOTION TO DISMISS.

I.

FEDERAL QUESTIONS.

The impairment of the obligation of the contract of Nov. 13, 1894 (page 23, Printed Record), by the Act of May 24, 1895,—the different treatment of the five towns mentioned in the Act of June 28, 1895, from that of the other towns in the state, relating to town duties—the arbitrary taking of the money of the Town of Glastonbury without due process of law, as shown in the Special Act of June 28, 1895, are questions which appear in the record, and they are necessarily federal questions.

IMPAIRMENT OF THE OBLIGATION OF THE CONTRACT.

Since the commencement of these proceedings, and while they were pending in the State court, the state, through commissioners, settled with the Berlin Iron Bridge Company, with whom it had contracted to construct the bridge, and paid damages for the non-fulfillment of its contract. This settlement was evidently in anticipation of fatal objections that might be made to the Act of May 24, 1895, by reason of its impairment of that contract. But notwithstanding this settlement the question whether this act was void by reason of its effect upon the bridge contract, and is not also void for every other purpose, still remains, and this is a federal question. It is fully discussed on pages 9–23, inclusive, in the original brief.

EQUAL PROTECTION OF THE LAWS.

The question whether the town of Glastonbury and its taxpayers are deprived of the equal protection of the laws, in violation of the 14th Amendment, is discussed on pages 54 and 55 of the original brief.

The five towns mentioned in the act have been put into a class by themselves, and separated from the other towns of the state by being subjected to different treatment in regard to town duties, and are therefore deprived of the equal protection of the laws.

In the case of —

> Gulf, Colorado & Sante Fe R'y., vs. Ellis, 165 U. S., 150 (165) —

it was held (opinion by Mr. Justice Brewer) that

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made,

but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

DUE PROCESS OF LAW.

In the original brief this question is discussed on pages 23–54, inclusive. The Acts of May 24, 1895, and June 28, 1895, do not constitute due process of law:

1st. Because they deprive the town of the right to perform town duties (imposed by the acts) by officers of their own choosing, which is contrary to the settled practice and law of the state, and arbitrarily destroys a right which those towns had before the Connecticut Constitution was adopted, and which was not taken away by that instrument. Town government is to this extent abolished, and the positive orders of state commissioners, appointed at the Capitol, are put in its place.

2. Because the acts provide for arbitrarily taking the property of the inhabitants of Glastonbury without proper notice of any proceedings under which the property is to be taken, and without opportunity to be heard.

Upon the first point we cite the case of Mattox vs. United States, 156 U. S., 237 (243), in which this court held (opinion by Mr. Justice Brewer) that the Constitution is to be interpreted "in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject, such as his ancestors had inherited and defended since the days of Magna Charta."

This applies with equal force to the Constitution of the State of Connecticut.

In the case of Murray's Lessees *vs.* Hoboken Land and Improvement Company, 18th Howard, 230, it was held (opinion by Mr. Justice Curtis) that in order to determine what is due process "we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our own ancestors, and which are shown not to have been unsuited to our civil and political condition by having been acted on by them after the settlement of this country."

"Due process of law" requires only that the procedure shall be in accordance with the law and settled practice of the state.

Holman *vs.* Manning (N. H.), 19 A. 1002.
Am. Digest 1890, page 634, paragraph 243.

We have already shown that the towns named in the act had the right of performing town duties through officers of their own choosing, both before and after the State Constitution was adopted. (See pages 24, 25, 26, 49, 50, 51, 52, and 53 of the original brief.) See also extract from "Connecticut Laws of 1643," and an extract from "Ludlow's Code" (1650), quoted on page 34 and 35 of the original brief. See also copy of the statute laws of the state, showing the law relating to building and repairing bridges between towns, quoted on page 55. The laws of the State of Connecticut relating to the maintenance of highways are as follows:—

"SEC. 2665. Towns at their annual meetings may provide for the repair of their highways, for periods not exceeding five years, and if any town neglect to so provide at such meeting the selectmen may provide for such repairs for a period not exceeding one year.

"SEC. 2666. Towns shall, within their respective limits, build and repair all necessary highways and bridges, and all highways to ferries as far as the low-water mark of the waters over which the ferries pass, except where such duty belongs to some particular person. It shall be the duty of

> the town of Waterbury to construct and maintain all necessary bridges over the Naugatuck and Mad Rivers within the limits of said town."

The General Statutes of the state require that town duties shall be discharged by town officers, and largely by the selectmen. The provision of the statute relating to the duties of selectmen on this point is as follows:

> "They shall superintend the concerns of the town, adjust and settle all claims against it, and draw orders on the treasurer for their payment."
>
> See Section 64, p. 17, Gen. Stat. of Conn., 1888.
>
> See also Sec. 64 to 70, inclusive, for the provisions of the Connecticut law relating to the duties of selectmen in relation to town affairs.

These laws show what rights Connecticut towns had in relation to town duties before and since these rights were protected and preserved by the Constitution. (For a discussion of this point see the dissenting opinion of Chief Justice Andrews, concurred in by Justice Hamersley, Record, pages 88 and 89.)

If the "law of the land" as applied to Connecticut correctly appears in the statutes and codes above cited, then the Special Act of June 28, 1895, which provides for the discharge of town duties by outside commissioners, is in violation of that law of the land, and consequently is not due process of law.

The "due process of law" herein contended for is an inheritance from our English ancestors, and it was "the law of the land" always after King John, at the demand of the barons of England, gave his unwilling signature to Magna Charta.

On the second point we cite the case of County of San Mateo *vs.* So Pacific Ry., 8th American and English Rail-

road Cases, 27, 13th Fed. Reporter, 722. The opinion is given by Mr. Justice Field, in which he says:

> "There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action."

And again, in speaking of what constitutes due process of law, he says:

> "And by 'due process' is meant one which, following the form of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary manner prescribed by the law: it must be adapted to the end to be attained, and it must give to the party to be affected an opportunity to be heard respecting the justice of the judgment sought. Without these conditions entering into the proceedings, it would be anything but due process."

Tried by this test, the Act of June 28, 1895, falls within the prohibitions of the Fourteenth Amendment.

The Bridge Commission pronounces judgment against these towns for certain sums of money, from time to time, as in its opinion may be needed. True, it is not a court, but it is a tribunal created with power to take the property of the citizens, and that is as much power over property as courts have. The towns to be affected have had no voice in selecting this commission, and no provision for reviewing its judgments is made. They have no voice in limiting the expenditures under the act, and no hearing is accorded anywhere or at any stage of the proceedings, nor is any notice given to the town of the proposed assessment.

This is not due process of law, as it existed in Connecticut before and since the adoption of the present State Constitution.

Both of the acts complained of arbitrarily fix the proportion which each town shall pay; but there is no way of determining whether those proportions be just or unjust. The town of Glastonbury is not permitted to show that its proportion is too large as fixed by the act. The fact that no portion of the improvements is within the limits of the town cannot be shown as a reason why the proportion is too large, or in other respects wrong.

It also appears that the proportionate share of the towns in respect of bonds, when reckoned upon the basis of the grand list, as provided in the Act of June 28, 1895, is fixed by one ratio: Hartford, 79 per cent.; East Hartford, 12 per cent.; Glastonbury, South Windsor, and Manchester, 3 per cent. each; and the annual payments required to be made ("25 cents on each one thousand dollars of the grand list of such town") constitutes another ratio: Hartford, 85 per cent.; East Hartford, $4\frac{1}{2}$ per cent.; Glastonbury, $2\frac{1}{6}$ per cent.; South Windsor, $1\frac{2}{3}$ per cent.; Manchester, $6\frac{2}{3}$ per cent.

But no hearing whatever or notice to the towns as to these proportions is provided, and no opportunity to contest them. Glastonbury might claim that the wealth of Hartford is more than $100,000,000, while hers is less than $2,000,000. But no opportunity is accorded to the town to be heard before commissioners or anywhere else upon the question.

In regard to ordinary support and maintenance, it is provided that the five towns shall pay "such further sums as the commissioners may determine as the proportions of said towns under the provisions of this resolution."

Sec. 4, Special Act (at end of Sec.). Printed Record, page 54.

It is not provided that these proportions shall be the same as those of the cost of construction. If they are not to be the same, then they are to be, or may be, changed from time to

time by the commissioners. If, on the other hand, they are the same, then the amounts called for each year, or at certain periods, are to be fixed without notice, and with no opportunity to contest such amounts.

Can there be any manner of doubt that the process of fixing these proportions, or amounts, of the cost of ordinary support and maintenance is a process of assessment? Yet no notice or hearing is required or permitted.

In the case of Matter of Trustees of Union College, 129 N. Y., 308, it appears that an act of the legislature of New York provided for the establishment of a scale of water rents, to be fixed by a commission, and apportioned with reference to the character and location of the buildings. The act also fixed the aggregate amount of the water rents. It also provided that the apportionment among the taxpayers should be "in proportion to the area of the respective lots, and not to exceed one-fifth, nor to be less than one-tenth, of one per cent. per square foot." (page 312.)

No provision was made in the act for a hearing on the part of the property-owners, "either as to the arbitrary basis of apportionment, which took no account of value, or even as to its determination within the boundaries of the commissioners' discretion."

This act was held to be unconstitutional for want of notice to the persons affected by it and a hearing. This act bears a close resemblance to the acts of May 24 and June 28, 1895, of which we complain. The New York and Connecticut acts fix the proportionate amount to be paid for a public improvement, without notice or hearing to the persons or corporations who are to pay.

Judge Finch, in giving the opinion of the Court, says (page 313):

> "In fixing the aggregate sum to be raised and the area of property which shall pay it, the legislature determines a

public question, and upon considerations of the public interest and welfare. . . ."

"But when the public questions are settled, and the tax comes to be apportioned, a personal liability of the individual and a lien upon his property are initiated, and he has a right then to be heard upon all the questions which affect and determine that liability. His right is to pay no more than his just proportion, and the legislature cannot arbitrarily determine the amount, refusing the person assessed a reasonable opportunity to be heard."

In the case of Fall Brook Irrigation District *vs.* Bradley, 164 U. S., 112, decided in 1896, it was held (opinion by Mr. Justice Peckham), that the legislature of California could create a district for public purposes without any notice to the district created (174). That the "right which he (the taxpayer) therefore has, is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay," (page 175.) and that the irrigation act provided for notice and a hearing (pages 170 and 175).

It was also held that "due process of law is not violated, and the equal protection of the law is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one, provided by the statute."

We note this opinion also in reference to the question whether this Court is bound by the decision of the state court upon a question of due process of law. On page 159 the Court says:

"We do not assume that these various statements, constitutional and legislative, together with the decision of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and as

incident thereto, what is a public use. As here presented these are questions which also arise under the federal constitution, and we must decide them in accordance with our views of constitutional law."

In the case of Scott *vs.* McNeal, 154 U. S., 45, it was held that the Supreme Court of the United States is *not bound* by the construction of a statute of a state put upon it by the highest state court, in certain cases, and particularly when a question is "whether the statute provided for the *notice* required to constitute due process of law."

In the case of Iowa Central Railway Company *vs.* Iowa, 160 U. S., 389 (393), it was held (opinion by Mr. Justice White), that —

"The Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for the purpose gives *reasonable notice* and affords fair opportunity to be heard before the issues are decided."

In the case of Happy *vs.* Mosher *et al.*, 48 N. Y., 313 (317), it was held (Earl, J.), that due process of law

"Need not be a legal proceeding according to the course of the common law, neither must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity afforded him to defend. It matters not that it may be difficult for him to defend under the law, so long as it is not impracticable for him to do so by use of such reasonable efforts as the owners of property may generally be supposed to be capable of. This opportunity to defend, however, must not be merely colorable and illusory."

This case is sometimes quoted as furnishing an authority that notice is not required when property is taken for public

use, and that due process of law does not require notice to be given when property is taken, but it is disclosed in the opinion that the statute which was construed in that case provided for notice of the proceedings by publication, and that the property-owner should have the right to have the lien which might be placed on his property under the act, litigated before sale.

In the case of Winona & St. Peter Land Company *vs.* Minnesota, U. S. Rep., Volume 159, 526 (537) (1895), it was held (opinion by Mr. Justice Brewer), in relation to the imposition of a tax, that "if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined, or in subsequent proceedings for its collection," he is not deprived of his property without due process of law.

This law required publication of the list of delinquent taxpayers to be made, together with a notice in the form prescribed by statute, for at least two weeks, in some newspaper of general circulation in the county.

It also provided that any taxpayer interested could file an answer, setting forth his defense or objection to the tax or penalty, "and thereupon the court is to hear and determine the question raised by this complaint and answer as it hears and determines any other action." (Page 535 of the opinion.)

In the case of Chicago, Milwaukee & St. Paul Railway Company *vs.* Minnesota, 134 U. S., 418, it appears that the legislature of Minnesota passed an act establishing a railroad and warehouse commission with power to make rates of charges for transportation of property, and with no provision for any judicial inquiry as to the reasonableness of such rates. This court held (opinion by Mr. Justice Blatchford), the act to be in violation of the Fourteenth Amendment. We quote from the opinion (page 457):

"It deprives the company of its right to a judicial investigation by due process of law, under the form and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of matters in controversy, and substitutes therefor as an absolute finality the action of a railroad commission which, in view of the power conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

This act closely resembles the act of June 28, 1895.

See the case of Violett *vs.* Alexandria, Virginia Supreme Court of Appeals, Lawyers' Reports annotated, Vol. 31 (March 1, 1896), page 382.

In these proceedings it has been attempted to make the Act of May 19, 1887 (Printed Record, page 60), supply the want of any proceeding in which the question of benefits, or proportion of benefits, derived from the highway could be ascertained. But it appears that in 1893, when the state assumed the burden of maintaining the bridge, the legislature repealed that act. In many respects the law of 1887 was not open to the objection which we make to the Acts of 1895. In other words, the legislature of 1893 repealed the Act of 1887, which related to the maintenance of this highway, and which so far as it permitted the towns to perform their duties through officers of their own choosing, did not fall within the prohibition of the Fourteenth Amendment, and in 1895 passed an act relating to the same matter which did fall within its prohibition.

The Act of 1887 made the bridge and causeway a free public highway, and provided for ample notice to the towns to be affected. It permitted them to maintain the highway

through a board composed of the first selectman of each of the towns. This legislation bears no resemblance to the Act of June 28, 1895. (Printed Record, page 52.) The latter act provides for no notice to the towns required to maintain the highway, of any of the proceedings authorized by it, and gives the town no voice in the selection of officers to carry it out. Speaking generally, those cases cited to sustain the legislation of 1895 (Printed Record, pages 52 and 57) are cases where it appears that ample provision is made for giving notice to the municipal corporations to be affected.

The Special Act of June 28, 1895, is void, because it imposes assessments without notice.

It requires no argument to prove that an assessment for a public improvement without notice is void. This Court has plainly stated the doctrine, and has also laid down a rule by which it may be determined whether due notice is really provided in the law imposing the assessment

The rule is stated in the case of Davidson *vs.* New Orleans, 96 U. S., 97, as follows:

> "That whenever by the laws of the state or by state authority a tax, assessment, servitude, or other burden, is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The rule is reiterated and enforced in a recent case:

> Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112, (see pages 157 and 158.)

Neither the Special Act of June 28, 1895, nor the General Act of May 24, 1895, comply with this rule. They do not "provide for a mode of confirming or contesting the charge thus imposed." They do not provide "such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case," nor do they provide for any notice whatever to the party to be assessed. They do not provide for any revision of the assessment "in the ordinary courts of justice."

What is an assessment? To assess means "To fix or settle a sum to be levied or paid." Assessment: "The fixing or settling a sum to be levied or paid, according to a certain proportion."

"Valuation of property for the purpose of taxation and as preliminary to it." "A pecuniary imposition upon persons or property, a tax."

See "Assessment" and "Assess." Burrill's Law Dictionary. Webster's Unabridged Dictionary.

But since the legislature has fixed the proportions, what process of assessment is left to be performed by the commissioners and requiring any notice?

The answer to this question is quite plain. The bridge is to cost any sum not exceeding $500,000, which may be fixed by the commissioners.

Special Act, Section 4, Printed Record, page 53.

It may cost $100,000, or $200,000, $300,000, and so on. In other words, the legislature says to the commissioners: "Go out and build a bridge and assess the cost of it upon the towns. If it costs $100,000, assess that sum. If it costs $500,000, assess that sum."

This process is an assessment beyond all doubt. True, the legislature has fixed proportions, but that was done without

notice to Glastonbury. It will not be pretended that this town had any notice to be heard upon the Acts of 1895. But we have already shown that "the legislature cannot arbitrarily determine the amount, refusing the person assessed a reasonable opportunity to be heard."

See case of Matter of Trustees of Union College, 129 N. Y., 308 (page 313) before cited.

Again, suppose Glastonbury denies that the real cost of the bridge is, say, $500,000, although the commissioners have undertaken to demand that sum. What opportunity has she to contest such inequitable charge or demand?

No provision whatever is made for any defense in such a case. All that the commissioners need to do is simply to determine that the bridge has cost a certain amount, and then to repair to the town treasury, demand what money they have determined to be due, and take it.

Referring to the sweeping provisions of the act found in the 7th Section, (Printed Record, page 55), we challenge our opponents to show any law of Connecticut under which the town of Glastonbury can contest the charge thus imposed.

The orders of the commission are declared to be absolutely obligatory upon the town. The treasurer must pay in pursuance of such orders, and the commissioners may apply to any court of competent jurisdiction for a mandamus in order to enforce upon the town and its treasurer the orders of the commission.

Suppose that the town should become convinced that the amounts assessed had been greatly overcharged and should apply for an injunction? The commissioners would simply reply, "We have determined that this bridge has cost $500,000, and our findings and orders are absolutely obligatory upon the five towns, and the court therefore has no authority to enjoin us." We beg leave to inquire what answer Glastonbury could make to this position?

The truth is, this law imposes assessment without notice, and assessment without notice is void.

Stuart *vs.* Palmer, 74 N. Y., 183 (188).

This is the result of placing state commissioners over towns to perform town duties. The chief justice of the state court has pointed out the unconstitutional character of such laws, and we now add that the appointment of these state commissioners over the towns has led to provisions for assessment without notice, which is void under state and federal constitutions.

As to the assessment of ordinary town taxes, the party has abundant opportunity to contest a charge or burden by appeal from the assessors to a Board of Relief, and also from the latter tribunal to the Superior Court.

Gen. Statutes Connecticut, Revision 1888, Sections 3852 and 3860. Acts of 1897, Chap. 133, page 843.

But these provisions have no relation to such an assessment as the one now before the court.

The special act of June 28, 1895, gives none of those remedies by appeal from assessments, which the tax laws of Connecticut justly provide, but does provide summary proceedings for the collection of the assessment.

In other words, the law provides for assessment without notice, appeal, or contest, and then provides for collection by the most direct and stringent methods.

We are not now complaining of the injustice of such laws. We simply say that they are unconstitutional and void.

Many more authorities, both federal and state, might be cited on this point, but those already cited are sufficient to sustain the claim made by the plaintiffs in error.

While due process of law does not, under the decision of this court, necessarily imply a regular proceeding in a court of justice, or after the manner of such court, yet, where some other proceeding is substituted for court proceedings, under which property may be taken, due process still requires that whatever the proceedings may be, a notice and a hearing must be accorded to the person or corporation whose property is taken.

We submit that there is error in the judgment of the state court.

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HARTFORD, CONN., January 12, 1898.